

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JODY K. WILLIAMS,	)	
	)	No. CV-07-0321-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DIRECTING ENTRY OF
MICHAEL J. ASTRUE,	)	JUDGMENT FOR DEFENDANT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 16.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney David M. Blume represents Defendant. After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment in favor of Defendant.

Plaintiff protectively filed for disability insurance benefits on May 23, 2003, and filed for Supplemental Security Income (SSI) benefits on May 30, 2003, alleging an onset date June 2, 2002. (Tr. 86, 403.) She claims disability due to diabetes, neck problems, hand surgeries, rib removal, thyroid problems, and irritable bowel syndrome (IBS). (Tr. 58, 69.) Following a denial of benefits and reconsideration, a hearing was held before Administrative Law Judge (ALJ) Paul Gaughen. (Tr. 601-35.) The ALJ denied benefits and

1 Plaintiff requested review by the Appeals Council. Plaintiff  
2 submitted additional medical evidence to the Appeals Council, which  
3 it considered before denying her request for review. (Tr. 8-14,  
4 411-599.) This appeal followed. Jurisdiction is appropriate  
5 pursuant to 42 U.S.C. § 405(g).

#### 6 **STATEMENT OF FACTS**

7 The detailed facts of the case are found in the transcript of  
8 proceedings and are briefly summarized here. At the time of the  
9 hearing, Plaintiff was 46 years old, had an eighth or ninth grade  
10 education and lived alone in an apartment. (Tr. 75, 605, 616.) She  
11 testified she could read and write and was able to care for her  
12 personal needs, including cooking, grocery shopping, cleaning her  
13 apartment and some light gardening. She did not drive and stated  
14 she got help with household chores from her daughter and the  
15 neighbors. (Tr. 605, 614-17.) She had past work experience as a  
16 housekeeping inspector, housekeeping cleaner, laundry worker and  
17 nursing home cleaner. (Tr. 70, 78-83, 621.) At the hearing, she  
18 testified she could sit for one half hour, stand for one half hour  
19 and walk for about a block and a half before her pain became severe.  
20 (Tr. 609.) She stated she had to put her feet up two or three times  
21 a day for a half hour to an hour due to swelling. (Tr. 613.) She  
22 also stated she could lift about a gallon of milk with her right  
23 hand without pain, but had no problems with her left hand. (Tr.  
24 610.)

#### 25 **ADMINISTRATIVE DECISION**

26 At step one of the sequential evaluation, the ALJ concluded  
27 Plaintiff had not engaged in substantial gainful activity. (Tr.  
28 33.) At step two, he found Plaintiff had the severe impairments of

1 "diabetes mellitus type II (insulin dependent), under variable  
2 control, right upper extremity impairment, and vascular disease of  
3 the extremities with bilateral lower extremity venous changes  
4 (cellulitis). (Tr. 30.) At step three, he found these impairments  
5 did not meet the requirements of 20 C.F.R. Part 404, Subp. P,  
6 Appendix 1 (Listings). (Tr. 33.) At step four, ALJ Gaughen made  
7 the following residual functional capacity (RFC) finding:

8 Claimant retains the residual functional capacity to lift  
9 or carry up to 15 pounds, but is unable to do so over the  
10 shoulder with the dominant right upper extremity. She is  
11 unable to be on her feet, standing or walking, for more  
12 than 1 hour at a time in an 8-hour day. She can sit 1  
hour at a time and needs a sit/stand option. She needs  
regular work hours with set breaks. She should avoid work  
at unprotected heights.

13 (Tr. 31, 33-34.)

14 Based on the record and testimony from a vocational expert, the  
15 ALJ determined Plaintiff could no longer perform past relevant work.  
16 At the hearing, the ALJ propounded a hypothetical question to  
17 vocational expert Deborah N. Lapoint, which included the RFC  
18 limitations listed above. (Tr. 621.) The vocational expert  
19 testified there were jobs available the Plaintiff could perform,  
20 including parking lot attendant, seated cashier, office helper, and  
21 production assembler. (Tr. 623.) At step five, the ALJ found  
22 although Plaintiff could not perform the full range of light work,  
23 she was capable of performing other work in the regional and  
24 national economy, therefore she was not under at "disability" as  
25 defined by the Social Security Act. (Tr. 34.)

#### 26 ISSUES

27 The question presented is whether there was substantial  
28 evidence to support the ALJ's decision denying benefits and, if so,

whether that decision was based on proper legal standards. Specifically, Plaintiff asserts the ALJ erred when he (1) failed to fully develop the record; (2) failed to give appropriate weight to the nurse practitioner who treated Plaintiff; and (3) improperly rejected Plaintiff's pain and symptom testimony. (Ct. Rec. 13 at 7.)

#### STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the court set out the standard of review:

The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Soc. Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

#### SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months."

42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

## DISCUSSION

### 1. Credibility

Plaintiff contends the ALJ erred in rejecting her allegations of pain and functional limitations. (Ct. Rec. 13 at 12.) The ALJ must engage in a two-step analysis in deciding whether to admit a claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step, the claimant must produce objective medical evidence of an underlying "impairment," and must show that the impairment, or a combination of impairments, "could reasonably be expected to produce pain or other symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9<sup>th</sup> Cir. 1986). Once the *Cotton* test is met, the ALJ must evaluate the credibility of the claimant. *Smolen*, 80 F.3d at 1281-82. If there is no affirmative evidence of malingering, the ALJ must provide "clear and convincing"

1 reasons for rejecting Plaintiff's pain and/or symptom testimony.  
2 *Rollins v. Massanari*, 261 F.3d 853, 858 (9<sup>th</sup> Cir. 2001); *Smolen*, 80  
3 F.3d at 1283-84. The ALJ may consider the following factors when  
4 weighing the claimant's credibility: "[claimant's] reputation for  
5 truthfulness; inconsistencies either in [claimant's] testimony or  
6 between [his/her] testimony and [his/her] conduct; [claimant's]  
7 daily activities; [his/her] work record; and testimony from  
8 physicians and third parties concerning the nature, severity, and  
9 effect of the symptoms of which [claimant] complains." *Light v.*  
10 *Social Security Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997). If the  
11 ALJ's credibility finding is supported by substantial evidence in  
12 the record, the court may not engage in second-guessing. See  
13 *Morgan*, 169 F.3d at 600. If a reason given by the ALJ is not  
14 supported by the evidence, the ALJ's decision may be supported under  
15 a harmless error standard. *Curry v. Sullivan*, 925 F.2d 1127, 1131  
16 (9<sup>th</sup> Cir. 1990) (applying the harmless error standard); *Booz v.*  
17 *Secretary of Health and Human Serv.*, 734 F.2d 1378, 1380 (9<sup>th</sup> Cir.  
18 1984).

19 Here, after summarizing the medical record, the ALJ considered  
20 Plaintiff's complaints, "including pain" and found Plaintiff's  
21 statements "concerning her impairments and their impact on her  
22 ability to work are not entirely credible." (Tr. 31, 32.) He  
23 specifically discounted her testimony "in light of discrepancies  
24 between her assertions and information contained in her documentary  
25 reports," citing to her daily activities questionnaire and her pain  
26 questionnaire. (Tr. 31, 90-94, 102-04.) The ALJ also found there  
27 was no medically determinable impairment to explain Plaintiff's  
28 complaints of back and neck impairments that would prevent her from

1 sustained sitting. He found imaging reports of her back showed  
2 minimal to no impairment, and the record indicated her symptoms were  
3 treated effectively with medication. These specific findings are  
4 supported by substantial evidence. (Tr. 28, 29, 31, 114, 132-36,  
5 165-66, 180-83, 274, 484.)

6 In July 2004, and July 2005, Bruce Becker, M.D., Plaintiff's  
7 treating physician, noted Plaintiff was responding well to pain  
8 medication, but was not benefitting from physical therapy due to  
9 uncontrolled diabetes complications. (Tr. 478, 484.) However, in  
10 February 2005, Plaintiff had reported to nurse practitioner Nancy  
11 Wickre, that she liked to stay active "doing gardening, housework  
12 and walking." (Tr. 367.) At that time, Ms. Wickre observed  
13 Plaintiff's blood sugar levels and lower extremity cellulitis were  
14 "much improved" on her current medication. (Tr. 367.)

15 The ALJ also noted several inconsistencies in Plaintiff's  
16 reports to third parties. Specifically, he cited Plaintiff's  
17 reports to examining physician Diane Rubin, M.D., that she could  
18 grocery shop by herself, drive up to 30 minutes and occasionally  
19 walk up to three blocks. (Tr. 31, 181.) Although she reported to  
20 Dr. Rubin in December 2003 that she could no longer swim, in July  
21 2004, she told hospital emergency room personnel that she injured  
22 her rib while swimming at the lake. (Tr. 181, 340.) The ALJ gave  
23 sufficient "clear and convincing" reasons, supported by substantial  
24 evidence, to discount Plaintiff's symptom testimony. *Batson v.*  
25 *Comm. of the Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9<sup>th</sup> Cir. 2004).

26 2. New Evidence

27 In this circuit, when the Appeals Council specifically  
28 considers new evidence in the context of denying the claimant's

1 request for review, "we consider the rulings of both the ALJ and the  
2 Appeals Council," and the record before the reviewing court includes  
3 the ALJ's decision as well as the new evidence. *Ramirez v. Shalala*,  
4 8 F.3d 1449, 1452 (9<sup>th</sup> Cir. 1993); *Gomez v. Chater*, 74 F.3d 967, 971  
5 (9<sup>th</sup> Cir. 1996). The Appeals Council shall consider "new and  
6 material" evidence only if such evidence relates to the period on or  
7 before the date of the ALJ's decision. See 20 C.F.R. § 404.970;  
8 *Bates v. Sullivan*, 894 F.2d 1059, 1064 (9<sup>th</sup> Cir. 1990), *overruled on*  
9 *other grounds*, *Bunnell v. Sullivan*, 947 F.2d 341, 342 (9<sup>th</sup> Cir.  
10 1991). Ordinarily, the district court may remand a case to the  
11 Commissioner in light of new evidence only if the evidence is new  
12 and material and if there is good cause why it was not previously  
13 presented to the ALJ. 42 U.S.C. § 405(g); *Mayes v. Massanari*, 276  
14 F.3d 453, 462 (9<sup>th</sup> Cir. 2001); *Booz v. Secretary of Health & Human*  
15 *Servs.*, 734 F.2d 1378, 1380 (9<sup>th</sup> Cir. 1984). If the new evidence  
16 shows there is a reasonable possibility that it would change the  
17 outcome of the ALJ's determination, then remand is appropriate to  
18 allow the ALJ to consider the evidence. However, if the substantial  
19 weight of the evidence is irrefutably clear that the claimant is  
20 disabled, then a remand for benefits is appropriate. *Mayes*, 276  
21 F.3d at 462.

22 As mentioned above, Plaintiff submitted additional medical  
23 records which were considered by the Appeals Council. (Tr. 411-  
24 549.) The newly submitted evidence includes medical records from  
25 June 2000 to April 26, 2006, and contains treatment notes and  
26 reports from primary care ARNP Jolie Ewart, ARNP Nancy Wickre (who  
27 treated Plaintiff's diabetes), Dr. Becker, imaging reports and  
28 emergency room reports. The Appeals Council considered the evidence



1 and found it did not indicate a worsening of Plaintiff's condition  
2 and did not warrant a change in the ALJ's determination. (Tr. 8-  
3 10.) Because the new evidence was considered, those records  
4 pertaining to the period before the ALJ rendered his opinion are  
5 relevant to the claim and are part of the record subject to *de novo*  
6 review by the district court.

7 The court has reviewed the entire medical record, including the  
8 new evidence. In December 2003, Plaintiff saw Dr. Rubin for a  
9 thorough physical examination. Dr. Rubin concluded as follows:

10 Based on the objective findings, [Plaintiff] can't use her  
11 RUE [right upper extremity] above shoulder height. Her  
12 RUE push/pull at or below shoulder height should be  
13 limited to occasionally. Her lift/carry should be limited  
14 to 15-20 lbs. occasionally (predominately one armed  
15 lifting). There were no observed fingering, feeling or  
16 manipulation limitations. She does have evidence of  
bilateral LE [left extremity] venous stasis changes which  
would limit her stand/walk to 3-4 hours distributed  
throughout an 8 hour work day and her use of stairs,  
kneeling, crawling and crouching should be limited to  
occasionally. She should avoid ladders. There were no  
sitting or communication limitations.

17 (Tr. 183.) Imaging reports from 2004 showed no right lower  
18 extremity deficits and mild to minimal changes in her cervical  
19 spine. (Tr. 29, 269, 274.) Plaintiff also saw Dr. Becker in July  
20 2004, April, June, and October 2005, and April 2006 for right  
21 shoulder pain and cervical degenerative disc disease. (Tr. 112,  
22 220-35, 477-78, 484.) In June 2005, Dr. Becker reported Plaintiff's  
23 pain issues improved with physical therapy and medication management  
24 and noted she was doing well with decreased pain, less swelling in  
25 her ankles and feet, and a tight right shoulder. He noted her lower  
26 extremity exam was "unremarkable" and recommended a decrease in pain  
27 medication and continued home exercises for her shoulder. (Tr.  
28 484.)

1 In August 2003, Ms. Ewart reported Plaintiff should be able to  
2 work in three months if she followed her physical therapy regime.  
3 (Tr. 415.) In December 2005, she reported Plaintiff's diabetes  
4 would affect her standing and walking, but the impact on Plaintiff's  
5 ability to perform work tasks would be "none." (Tr. 509.) She also  
6 reported Plaintiff's cervical disc degeneration would affect her  
7 handling and carrying, and have "moderate" impact on her ability to  
8 perform work activities. (*Id.*) Neither treating provider indicated  
9 Plaintiff was unable to work. Rather, in September 2004, Ms. Ewart  
10 completed a physical evaluation form for state benefits and opined  
11 Plaintiff could perform "light work"; in March and December 2005,  
12 she concluded Plaintiff was capable of participating in pre-  
13 employment activities and could perform "sedentary work" with  
14 restrictions in pushing, pulling, climbing and reaching. (Tr. 208,  
15 215, 509.)<sup>1</sup>

16 The opinions of Ms. Ewart and Dr. Becker, including their  
17 reports contained in the new evidence, are substantially consistent  
18 with examining physician Dr. Rubin's evaluation and the ALJ's final  
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20 <sup>1</sup> In the state physical evaluation forms, "light work" is  
21 defined as the ability to lift 20 pounds maximum, frequently lift  
22 and/or carry up to 10 pounds, possibly require walking or standing  
23 up to 6 hours out of an 8-hour day, involve sitting most of the time  
24 with occasional pushing and pulling with arm or leg controls.  
25 "Sedentary work" is defined in the form as "the ability to lift 10  
26 pounds maximum and frequently lift and/or carry such articles as  
27 files and small tools. A sedentary job may require sitting, walking  
28 and standing for brief periods." (Tr. 509.)

1 RFC. It is well-settled that the ALJ is "responsible for  
2 determining credibility, resolving conflicts in medical testimony  
3 and for resolving ambiguities," in these proceedings. *Richardson*,  
4 402 U.S. at 400; *Andrews*, 53 F.3d at 1039; SSR 96-8p. The final  
5 determination regarding a claimant's ability to perform basic work  
6 is the sole responsibility of the Commissioner. 20 C.F.R. §  
7 416.946; SSR 96-5p (RFC assessment is an administrative finding of  
8 fact reserved to the Commissioner). Further, where ALJ's  
9 determination is a rational interpretation of the evidence, the  
10 court will not substitute its judgment for that of the Commissioner.  
11 *Tackett*, 180 F.3d at 1097. Because there is not a reasonable  
12 possibility that the new evidence would change the outcome of the  
13 case, remand for consideration of Ms. Ewart's clinic notes and  
14 reports and other material new evidence is not warranted. *Mayes*,  
15 276 F.3d at 462.

16 3. ALJ's Duty to Develop the Record

17 In Social Security proceedings, the burden of proof is on the  
18 claimant to prove the existence of a severe physical or mental  
19 impairment by providing medical evidence consisting of signs,  
20 symptoms, and laboratory findings; the claimant's own statement of  
21 symptoms alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908.  
22 As a threshold to establishing an impairment, it is the claimant's  
23 responsibility to produce sufficient objective medical evidence of  
24 underlying impairment to show that the impairment, or a combination  
25 of impairments, "could reasonably be expected to produce pain or  
26 other symptoms." *Cotton*, 799 F.2d 1403.

27 Once medical evidence is provided by the claimant, the  
28 Regulations state the agency "will develop your complete medical

1 history for at least the 12 months preceding the month in which you  
2 file your application unless there is a reason to believe that  
3 development of an earlier period is necessary." 20 C.F.R.  
4 § 404.1512 (d), 416.912 (d). An ALJ's duty to develop the record  
5 further is triggered "only when there is ambiguous evidence or when  
6 the record is inadequate for proper evaluation of evidence." *Mayes*  
7 *v. Massanari*, 276 F.3d 453, 4509-60 (9<sup>th</sup> Cir. 2001) (*citing*  
8 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001)).

9 At the hearing, the ALJ indicated additional records would be  
10 sought from Nancy Wickre, the ARNP who treated Plaintiff's diabetes.  
11 (Tr. 630.) The request to Ms. Wickre for information was denied and  
12 additional records were not requested from Ms. Ewart. (Tr. 382-91.)  
13 Plaintiff argues the ALJ erred when he did not supplement the  
14 record. Although Plaintiff does not specify which opinions the ALJ  
15 failed to consider, she argues the ALJ did not give proper weight to  
16 Ms. Ewart's opinions. (Ct. Rec. 13 at 10-11.)

17 As discussed above, additional records from Ms. Ewart and other  
18 providers were received by the ALJ and considered by the Appeals  
19 Council. These records are substantially consistent with records  
20 considered by the ALJ in his sequential evaluation and fully develop  
21 the record. It is also noted that Ms. Ewart's observations and  
22 findings are substantially consistent with the ALJ's findings and,  
23 therefore, there was no need to give germane reasons for rejecting  
24 them.

25 Moreover, Ms. Ewart is not an acceptable medical source, and  
26 her opinions are not entitled to the weight accorded a treating  
27 physician. Plaintiff offers no legal support for her argument that  
28 Ms. Ewart should be considered a treating physician. Social

1 Security Regulations governing treatment of acceptable medical  
2 opinions do not apply to a nurse practitioner's opinions. 20 C.F.R.  
3 § 404.1527, 416.927. Rather, as a nurse practitioner, Ms. Ewart is  
4 considered an "other source." 20 C.F.R. §§ 404.1513 (d), 416.913  
5 (d) (evidence from other sources is used to show severity and how  
6 it affects ability to work). As such, Ms. Ewart's opinions must be  
7 considered by the ALJ in his determination and, if rejected, the ALJ  
8 must give reasons that are germane to Ms. Ewart. *Gomez v. Chater*,  
9 74 F.3d 967, 970-71 (9<sup>th</sup> Cir. 1996).

10 Here, Ms. Ewart's observations and assessments were considered  
11 by the ALJ, given "great weight" and incorporated substantially into  
12 his RFC determination.<sup>2</sup> Specifically, the ALJ's final RFC  
13 determination that Plaintiff could not lift over her shoulder with  
14 her right hand, could carry and lift up to 15 pounds, should not be  
15 on her feet for more than an hour, should have normal breaks and a  
16 sit/stand option, and was capable of a limited level of light work,  
17 is consistent with Ms. Ewart's treatment notes and evaluation forms

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18  
19 <sup>2</sup> Ms. Ewart's "other source" opinion that Plaintiff was  
20 "disabled" on the Spokane Housing Authority verification form (dated  
21 November 2004) is not controlling or given special significance.  
22 (Tr. 275.) Further, it conflicts directly with her September 30,  
23 2004, opinion that Plaintiff could perform "light work." (Tr. 208.)  
24 Even if Ms. Ewart were considered an acceptable medical source, the  
25 Regulations clearly state that an opinion by a medical source that  
26 a claimant is "disabled" is not controlling because it is an opinion  
27 reserved to the Commissioner in Social Security proceedings. 20  
28 C.F.R. §§ 404.1527 (e), 416.927 (e).

1 in the entire record before this court. (Tr. 33-34, 194-97, 200-  
2 03, 206-09, 213-16, 507-10.)

3 The record before the ALJ did not include conflicting or  
4 ambiguous evidence, and the new evidence considered by the Appeals  
5 Court and reviewed by this court does not raise new issues. Because  
6 there is no conflict or ambiguity, and the evidence on review is  
7 consistent with the ALJ's determination, remand is not necessary.  
8 Accordingly,

9 **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is  
11 **DENIED.**

12 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
13 **Rec. 16**) is **GRANTED.**

14 3. The District Court Executive is directed to file this  
15 Order and provide a copy to counsel for Plaintiff and Defendant.  
16 The file shall be **CLOSED** and judgment entered for Defendant.

17 DATED October 3, 2008.

18  
19 S/ CYNTHIA IMBROGNO  
20 UNITED STATES MAGISTRATE JUDGE  
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